



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

ELP
Docket No. 6253-99
12 September 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 30 August 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The microfiche records provided for the Board's review were incomplete and additional records were obtained from your former command. Based on these records, the Board found that you enlisted in the Naval Reserve on 17 September 1996 for two years as a YN2 (E-5). At the time of your enlistment, you had completed more than seven years of prior active service. An Evaluation Report and Counseling Record for the period ending 7 December 1997 was submitted to document your acceptance of a recall to active duty, which subsequently occurred on 6 January 1998. However, the orders recalling you to active duty are not in the record, and the record also does not show the length of the period for which you were obligated to serve on active duty.

The record reflects that you served without incident until 23 February 1998 when you were admitted to a naval hospital for dysthymia and suicidal ideation. You were afforded individual, group and milieu psychotherapy during which you expressed a sense of frustration with your current situation and failure to adapt

to life in the military, especially aboard an aircraft carrier. You underwent psychological testing and were diagnosed with "phase of life problems, occupational problems, and avoidant personality traits." However, you were considered competent and responsible for your actions and behavior, and released to full duty on 27 February 1998.

On 24 April 1998, you were charged with an unauthorized absence (UA) of 17 days, from 16 March to 2 April 1998. You explained to the investigating officer that the primary reason you went UA was because you felt humiliated when your leading chief petty officer (LCPO), a YNC (E-7), publicly asked you if you were a "second class or a fag?" You also reported pay and personal problems, a lack of uniforms, and stated that "you did not fit in." The legal officer noted that you had consulted an LNL (E-6) about getting money when you were not receiving a pay check, and opined that you should have gotten counseling from the chaplain or used your chain of command more effectively.

On 18 May 1998, the ship's security officer reported that you had attempted suicide early that morning. A SR (E-1) found you trying to choke yourself with a bed sheet. The SR stated your face was starting to turn red and he "froze" until he realized what was going on. He claimed the sheet was tied tightly around your neck.

On that same day, you received nonjudicial punishment (NJP) for the 17 day period of UA. Punishment imposed consisted of a reduction in rate to YN3 (E-4); forfeitures of \$716 per month for two months, which were suspended for six months; and 30 days of restriction and extra duty.

You appealed the NJP and stated that the reason for the UA was that your LCPO asked you if you were a second class petty officer or a "faggot." You stated that as inappropriate as it was to go UA, the LCPO's statement made you uncomfortable and insecure about being stationed on board the ship, and prompted you to write your congressman. You also said the other reason was that you were not getting paid, specifically, you were not paid until 6 March 1998 and then received no pay until 1 April 1998. You asserted that your punishment was disproportionate and requested that the restriction and extra duty be dismissed. You did not appeal the reduction in rate.

On 21 May 1998 the commanding officer (CO) recommended that your appeal be denied. He noted that the Equal Opportunity Programs Assistant had repeatedly met with you regarding your pay situation, and it was resolved prior to your period of UA. He stated that the LCPO's comment was unprofessional, was not tolerated and, as soon as the incident was reported, the LCPO and department head were immediately counseled. However, it was

clear to the CO that you had been provided with extensive counseling and assistance, and a positive work environment. The CO asserted that the punishment imposed clearly fit the offense committed and despite the serious nature of the offense, the forfeitures were suspended for six months. The supervisory authority's action denying your appeal was not part of records made available for the Board's review.

On 22 May 1998 you made a voluntary sworn statement to the ship's legal officer that you had read and understood Navy policy concerning homosexual conduct and that "bisexual conduct" was considered "homosexual conduct" for the purposes of Navy regulations. You said that you considered yourself bisexual, that you liked women more than you did men, but that you were somewhat attracted to men. You claimed that you had physical experiences with men both before and subsequent to enlistment, and your last such experience was the first weekend of March 1998. You also related that after this incident, you had a three-way encounter with a man and a woman in which you performed oral sex on both of them. You stated that the reason you were coming forward with this information was because it was "stressing you out" and your blood pressure was elevated. You claimed that you became stressed about a lot of things and felt that you could not hide your homosexual conduct any longer. You also disclosed that you had discussed this with the chaplain as well. You also said "I did not disclose this information in response to anyone's questions" and that you had known that you were bisexual for a couple of years. You further stated the following:

"I've known about the "don't ask, don't tell" policy since I joined the Navy. I understand it to mean that no one is allowed to ask me about my sexuality, and neither am I allowed to tell anyone about my sexuality. I understand that I have violated Navy policy by disclosing my bisexual acts. Nevertheless, I chose to come forward because of the stress of my bisexual experiences. I feel like I have a propensity to perform homosexual acts. By that I mean I will continue to have homosexual relationships with other men."

You acknowledged that this disclosure was likely to lead to your separation from the Navy. As a result of your statement, the legal officer was appointed to conduct an investigation into the matter.

Statements by both the LPO and division officer state that during a counseling session on 22 May 1998, you seemed very nervous and agitated, and were unable to look either of them in the eye. You said that something had happened, but were uncomfortable with everyone in the office. When everyone left except to the LCPO

and the division officer, you told them that you had been speaking to the chaplain about a pre-service sexual encounter you had with both a man and a woman, and then told them about another encounter with a different man and woman in March of 1998. When asked you to clarify if you meant sexual relations with both a man and a woman, you said you did. Both individuals stated that no questions were asked about your sexual orientation.

On 24 May 1998, the legal officer reported to the CO that during a counseling session on 22 May 1998, you made an unsolicited disclosure to your leading petty officer and division officer that you had engaged in homosexual acts while on active duty. It was recommended that you be processed for discharge for homosexual conduct. Thereafter, you were notified that you were being considered for administrative separation by reason of homosexual conduct as evidenced by your voluntary statement. You were advised of your procedural rights, declined to consult with legal counsel, and waived your right to an administrative discharge board (ADB).

On 26 May 1998, the CO recommended that you be separated by reason of homosexual conduct with the type of discharge warranted by the service record. Thereafter, Commander, Naval Military Personnel Command directed separation with the type of discharge warranted by your service record. You received a general discharge on 27 May 1998.

On 10 January 2000, the Naval Discharge Review Board (NDRB) denied your request for an upgrade of your discharge.

In its review of your application, the Board conducted a careful search of your service record, and the documentation provided by your former command, which might warrant a recharacterization of your general discharge or removal from the record the NJP and your statement admitting to homosexual conduct. However, no justification for recharacterizing your discharge or removing this derogatory material from the record could be found.

The Board noted your explanation for the UA; and your contentions that your former command violated the "don't ask, don't tell" policy", and that you were told you could not have an ADB unless the ship was in port. You also claim that on 22 May 1998 you were in sick bay all afternoon because of elevated blood pressure and then were directed to report to the LPO and division officer, who questioned you about your whereabouts. You state that you were tired of all the things that were happening to you, so you decided to tell them that you had something on your mind, but that you were very reluctant to say anything and told them that "I don't think I should say anything." You claim that your LPO then asked you "have you committed a homosexual act?" You said

"yes" but did not say anything about what you had done until you were asked. You assert that this questioning was in violation of established policy.

The Board further noted the lengthy rebuttal you submitted in response to your former CO's comments regarding the issues raised in your application when he provided the Board with the NJP evidence and other documentation in your case. You provided further explanation of the circumstances leading to your psychiatric admission and the prolonged period of UA, provided additional argument that the "don't ask, don't tell" policy was violated, and added a new claim that you never received a uniform allowance because of your recall to active duty. You provided copies of your leave and earnings statements to support the claim that you were never paid a uniform allowance.

The Board concluded that that the foregoing contentions, assertions, and claims were insufficient to warrant recharacterization of your discharge given your record of an NJP for a 17-day period of UA. The Board concluded that such conduct in only seven months of service did not constitute fully honorable service.

The Board was not persuaded that the "don't ask, don't tell" policy was violated by your command. In this regard, the Board could not understand why you would then acknowledge, in writing, that disclosing your bisexuality violated Navy policy, no one was allowed to ask you about your sexuality, and you were not allowed to tell anyone about your sexuality. The evidence of record reflects that you disclosed to your LPO and division officer that you had a sexual encounter with both a man and a woman. That statement alone implied homosexual or bisexual conduct and created a rebuttable presumption that you engaged in, attempted to engage in, or had a propensity to engage in homosexual acts. The fact that the division officer asked you to clarify if that meant sexual relations with both a man and a woman did not violate the policy against asking you about your sexual orientation. There is nothing in your statement to show that your disclosure to your LPO and division officer was anything but voluntary and unsolicited. In fact, your statement says, "I did not disclose this information in response to anyone's questions." The Board concludes that despite your protestations to the contrary, there was no violation of the "don't ask, don't tell" policy. The Board noted a further aggravating factor that you waived an ADB, the one opportunity you had to show how the Navy violated its policy, or why you should be retained or separated with a fully honorable discharge. There is also no evidence to support your contention that an ADB could not be convened until the ship returned to port. However, even if this is true, you chose to be discharged rather than wait for an ADB.

Absent evidence of abuse of discretion by the CO to impose NJP, the Board found no basis for removal of the NJP from your record. The Board concluded that there was likewise no basis for removal of the statement admitting to bisexual conduct from your record. The Board thus concluded that discharge was proper and no change is warranted.

Your contention that you did not receive a uniform allowance was not considered by the Board, since you made no specific request for payment of a uniform allowance and because there were insufficient records upon which to make a determination on this issue. Since you enlisted in the Naval Reserve a month after your discharge, the Board noted that you still had the uniforms you were issued while on active duty. Therefore, it appeared to the Board there was no basis for a uniform allowance since you would have been required to maintain those uniforms issued on active duty. The fact several individuals claim you were entitled to a uniform allowance does not mean that you were so entitled. However, you may file a separate application on this single issue if you are seeking payment of a clothing allowance. A DD Form 149 is enclosed for your convenience of filing.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure